

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DALE MERRILL, ADMINISTRATOR OF THE
MASHANTUCKET PEQUOT TRIBAL NATION
HEALTH PLAN,

Plaintiff,

- against -

JING DENG, M.D, and JING DENG MD
REHABILITATION P.C.,
Defendants.

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DATE FILED: 6/14/21

20 Civ. 10689 (LLS)

MEMORANDUM & ORDER

Plaintiff's motion to dismiss defendants' counterclaims (Dkt. 16) and defendants' motion for leave to file an amended answer with counterclaims and partial motion to dismiss the complaint (Dkt. 24) are resolved as follows:

1. Defendants' amended answer with counterclaims (Dkt. 28 Ex. E) is accepted on consent.
2. Defendants having amended their answer, plaintiff's motion to dismiss their earlier-pleaded counterclaims is denied as moot.
3. Plaintiff shall respond to defendants' amended answer with counterclaims by June 28, 2021.
4. Defendants' partial motion to dismiss plaintiff's unjust enrichment, constructive trust, and conversion claims is denied.

Defendants' June 11 reply memorandum waives their argument that a three-year statute of limitations applies to plaintiff's unjust enrichment and constructive trust claims, leaving only their argument that the three-year statute of limitations bars

plaintiff's conversion claim for alleged overpayments made more than three years before the filing of the complaint.

"A cause of action for conversion accrues when the conversion takes place. If possession of the property is originally lawful, a conversion occurs when the defendant refuses to return the property after a demand or sooner disposes of the property." White v. City of Mt. Vernon, 221 A.D.2d 345, 346, 633 N.Y.S.2d 369, 370 (2d Dep't 1995) (citation omitted).

The parties dispute whether plaintiff demanded defendants return the overpayments at issue. The complaint alleges that plaintiff made a demand on July 16, 2020. Defendants claim that plaintiff could not have made a demand in July 2020 because defendants' medical office was then closed due to the coronavirus pandemic and that defendants did not receive a demand before the filing of this suit.

Whether plaintiffs made or defendants received a demand is a fact dispute not appropriate for resolution on the face of the complaint.

Defendants' partial motion to dismiss plaintiff's unjust enrichment, constructive trust, and conversion claims is thus denied.

So ordered.

Dated: New York, New York
June 14, 2021

Louis L. Stanton
LOUIS L. STANTON
U.S.D.J.